

Honorable Judge Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOMBARDIER INC.,

Plaintiff,

v.

MITSUBISHI AIRCRAFT CORPORATION,
MITSUBISHI AIRCRAFT CORPORATION
AMERICA INC., AEROSPACE TESTING
ENGINEERING & CERTIFICATION INC.,
MICHEL KORWIN-SZYMANOWSKI,
LAURUS BASSON, MARC-ANTOINE
DELARCHE, CINDY DORNÉVAL, KEITH
AYRE, AND JOHN AND/OR JANE DOES 1-
88,

Defendants.

No. 2:18-cv-01543-RAJ

BOMBARDIER INC.'S
RESPONSE TO MITSUBISHI
AIRCRAFT CORPORATION
AMERICA, INC.'S MOTION TO
FILE UNDER SEAL ITS
OPPOSITION TO
BOMBARDIER'S MOTION FOR
PRELIMINARY INJUNCTION
AND SUPPORTING MATERIALS
THERE TO

**NOTE ON MOTION
CALENDAR:
JANUARY 18, 2019**

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Rules

Fed. R. Civ. P. 26	1
Fed. R. Civ. P. 26(c)(1)(G)–(H)	2

1 Plaintiff Bombardier Inc. (“Bombardier”) hereby responds to Defendant Mitsubishi
 2 Aircraft Corporation America, Inc.’s (“MITAC America”) Motion to File Under Seal Its
 3 Opposition to Bombardier’s Motion for Preliminary Injunction and Supporting Materials
 4 Thereto filed on December 27, 2018 (Dkt. No. 69, “Motion to Seal”). In addition, pursuant to
 5 the Stipulated Interim Agreement Re Confidential Documents and Information (Dkt. No. 50-
 6 2, “Stipulated Agreement”), Fed. R. Civ. P. 26, and LCR 5, Bombardier sets forth the
 7 applicable legal standard and the reasons for keeping under seal certain information
 8 referenced in Mitsubishi America’s Opposition to Bombardier’s Motion for Preliminary
 9 Injunction and supporting materials thereto (Dkt. Nos. 75-79).

10 **INTRODUCTION**

11 MITAC America’s Motion to Seal makes much ado about nothing. It frames the issue
 12 before the Court as one where Bombardier is insisting upon the sealing of documents that
 13 “have no business being filed under seal,” that “do not meet the Ninth Circuit’s requirement
 14 for being filed under seal,” and that “Bombardier’s improper tactics should not be condoned.”
 15 (Motion to Seal, Dkt. No. 69, at 2.) More accurately, MITAC America sought to file
 16 approximately 1700 pages of documents to oppose Bombardier’s Motion for Preliminary
 17 Injunction in a trade secret case, provided no advance notice that its filing would be so
 18 voluminous, refused to identify any of those documents in advance of its filing, provided less
 19 than 24 hours for Bombardier’s counsel to review those documents for redaction purposes,¹
 20 and in response Bombardier simply requested to file the documents under seal on an interim
 21 basis so that it could have more time to review the documents for proper redaction.

22
 23
 24 ¹ Admittedly, Bombardier did agree in advance of receiving MITAC America’s filing that it would
 25 provide proposed redactions to MITAC America within 24 hours of receipt of the papers, but Bombardier had no
 26 idea—and had no reason to suspect—at the time of agreement that it would be forced to review approximately
 27 1700 pages overnight. That information was exclusively in the possession of MITAC America prior to service
 of its papers, and MITAC America could have provided notice at any time. (See Declaration of Brian F.
 McMahon in Support of Bombardier’s Response to MITAC America’s Motion to File Under Seal (“McMahon
 Decl.”), filed concomitantly herewith, at Exhibit A.)

1 With sufficient time to review the documents at issue, Bombardier now respectfully
 2 asks the Court to maintain the limited information identified below outside of the public
 3 sphere, and requests that the remaining information be filed publicly. As set forth below, the
 4 specific information Bombardier seeks to keep under seal concerns proprietary research,
 5 development, business strategy, trade secret, and other competitive commercial information,
 6 and is the properly designated for filing under seal in this District.

7 **ARGUMENT**

8 **I. Legal Standard**

9 The operative Stipulated Agreement and applicable court rules permit MITAC
 10 America to file material under seal. Pursuant to the Stipulated Agreement executed by the
 11 parties on December 6, 2018 (modeled heavily on this Court's Model Stipulated Protective
 12 Order), MITAC America may seek to file under seal confidential material or material
 13 discussing or referencing such material, with such material to remain under seal upon Court
 14 approval. Paragraph 4.3 of the Stipulated Agreement provides as follows:

15 Before filing confidential material or discussing or referencing
 16 such material in court filings, the filing party shall confer with the
 17 designating party to determine whether the designating party will
 18 remove the confidential designation, whether the document can be
 19 redacted, or whether a motion to seal or stipulation and proposed
 order is warranted. Local Civil Rule 5(g) sets forth the procedures
 that must be followed and the standards that will be applied when a
 party seeks permission from the court to file material under seal.

20 (Dkt. No. 50-2, at ¶ 4.3.)

21 Furthermore, the Federal Rules of Civil Procedure recognize that courts may permit
 22 parties to file "trade secrets or other confidential research, development, or commercial
 23 information" under seal. Fed. R. Civ. P. 26(c)(1)(G)–(H). District courts are "in the best
 24 position to weigh fairly the competing needs and interest of the parties affected by discovery"
 25 in crafting the appropriate treatment of documents for which protected treatment is requested.
 26 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also Phillips v. General Motors*

1 *Corp.*, 307 F.3d 1206, 1211–1212 (9th Cir. 2002). “A ‘good cause’ showing under Rule
 2 26(c) will suffice to keep sealed records attached to non-dispositive motions.” *Kamakana v.*
 3 *City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006).

4 It is well settled “that a trade secret may consist of a compilation of data, public
 5 sources or a combination of propriety and public sources.” *United States v. Nosal*, 844 F.3d
 6 1024, 1042 (9th Cir. 2016); *accord Digital Mentor, Inc. v. Ovivo USA, LLC et al.*, No. C17-
 7 1935-RAJ, 2018 WL 6724765, at *7 (W.D. Wash. Dec. 21, 2018) (stating that the Court “did
 8 not dispute” that a trade secret may be “comprised of elements that have been in the public
 9 domain or are well-known.”) Under the law of this Circuit, “The fact that some or all of the
 10 components of the trade secret are well-known does not preclude protection for a secret
 11 combination, compilation, or integration of the individual elements.” *Nosal*, 844 F.3d at 1042
 12 (quoting Restatement (Third) of Unfair Competition § 39 cmt. f (1995) and citing *Computer*
 13 *Care v. Serv. Sys. Enters., Inc.*, 982 F.2d 1063, 1074 (7th Cir. 1992) (“A trade secret can exist
 14 in a combination of characteristics and components, each of which, by itself, is in the public
 15 domain, but the unified process design and operation of which in unique combination affords
 16 a competitive advantage and is a protectable trade secret”); *see also Boeing Co. v. Sierracin*
 17 *Corp.*, 108 Wash.2d 38, 738 P.2d 665, 675 (1987) (holding that “trade secrets frequently
 18 contain elements that by themselves may be in the public domain but together qualify as trade
 19 secrets”)).

20 **II. Information Identified Herein Should Remain Under Seal**

21 As noted above, Bombardier agrees that much of MITAC America’s December 27,
 22 2018 filing under seal may be filed in the public domain. However, Bombardier was in no
 23 position to make that determination within the 24-hour period previously agreed to by the
 24 parties because Bombardier had no idea—and MITAC America provided no indication—that
 25 the December 27 filing would exceed 1700 pages. MITAC America contends that this is no
 26 excuse, however, because many of the documents comprising that voluminous total are public
 27 documents. (Motion to Seal, Dkt. No. 69, at 3-4.) But this position ignores a long-established

1 principal of trade secret law—“trade secrets frequently contain elements that by themselves
2 may be in the public domain but together qualify as trade secrets.” *Boeing Co.*, 738 P.2d at
3 675. Thus, Bombardier needed adequate time to ensure that any unredacted identification of
4 publicly available information did not diminish the value of Bombardier’s trade secrets.

5 One of the primary arguments MITAC America makes in its Opposition to
6 Bombardier’s Motion for Preliminary Injunction is that much of the information contained in
7 the documents at issue—the misappropriated documents containing Bombardier trade
8 secrets—is publicly available, but that argument falls flat. (MITAC America’s Opposition to
9 Plaintiff’s Motion for Preliminary Injunction, Dkt. No. 75 (“Opposition”), at 3-6.) Its
10 Opposition, and the documents submitted in support, therefore go to great lengths to identify
11 for the Court where information contained in the Bombardier documents may be found
12 publicly. (*See, e.g.*, Declaration of Robert John Hansman Jr., Dkt. No. 78, at Exhibit 7
13 (expressly identifying 32 topics contained in a document lodged under seal with the Court,
14 citing where the topic is addressed in that document, and alleging with precision where that
15 information can be found in the public); Declaration of Stephen Boyd, Dkt. No. 77, at 38 (“It
16 should be noted that this report is referenced in Burns Sealed Exhibits D and G.”).)

17 Assuming MITAC America’s allegation to be true, filing its papers publicly without
18 redaction would therefore eviscerate any competitive advantage Bombardier could derive
19 from its compilation of publicly available information. (*See, e.g.*, Declaration of Daniel
20 Burns in Support of Motion for Preliminary Injunction, Dkt. No. 5 (“Burns Decl.”), at ¶¶ 4
21 (“information in these documents [can be used] as a roadmap to design, develop, and to obtain
22 regulatory acceptance of a future aircraft’s SDS design for years to come”), 12 (“that is not to
23 say that at least some of the information disclosed in these exhibits could not be gleaned
24 through publicly available information . . . [b]ut the exhibits also disclose . . . the technical
25 references relied upon by Bombardier to demonstrate compliance . . . [that is not] publicly
26 available or readily ascertainable without reference to Bombardier proprietary information”);
27 *see also* Declaration of David Tidd in Support of Motion for Preliminary Injunction, Dkt. No.

7 (“Tidd Decl.”), at ¶ 4 (the document at issue “contains, for example, numerous coefficients, coefficients *determined by equations and constants that were negotiated with the applicable regulatory authorities*, that are used for performance calculations”).

The value in Bombardier’s trade secret information lies not only in the proprietary information contained in the documents at issue that are not readily ascertainable by public means, but also in the fact that certain specified publicly available information *was used by Bombardier with success* for certification purposes. The identity of that information is not public, is at least confidential, and Bombardier contends that it constitutes in part the trade secret information at issue. Public disclosure of that information prior to trial will deny Bombardier the opportunity to prove the value derived from keeping that compilation of publicly available information secret.

Good cause therefore exists to keep such information from public disclosure, and Bombardier therefore respectfully requests that public versions of MITAC America’s documents (Dkt. Nos. 75-79) should have the following redactions:²

Dkt. No. 75, Defendant Mitsubishi Aircraft Corporation America, Inc.’s Opposition to Plaintiff’s Motion for Preliminary Injunction:

In addition to the redactions found in the public version of this document already filed with the Court at Dkt. No. 71, MITAC America should be ordered to withdraw its Dkt. No. 71 and supplement its redactions to include redaction of the entire text starting immediately after “are explained” at page 4, line 26, and ending with the end of page 5, line 10. Bombardier had originally requested that MITAC America redact all references to the identified texts in this passage, but MITAC America refused. The explicit identification of the references, particularly given the context of MITAC America’s arguments, would inform the public that these texts have information *relied upon successfully by Bombardier to certify its aircraft*,

² For the Court’s and MITAC America’s convenience, a copy of Dkt Nos. 75, 77, and 78 with Bombardier’s requested redactions are attached as exhibits to the McMahon Decl., Exhibits B-D.

1 which is information not publicly known and is at least confidential and proprietary to
2 Bombardier's business.

3 Bombardier respectfully requests the additional redactions identified above,
4 notwithstanding that MITAC America has already publicly disclosed the information at issue,
5 because the issue may soon become a slippery slope. MITAC America's current limited
6 identification of the documents successfully relied upon by Bombardier for aircraft
7 certification purposes, without more, do not constitute so extensive a disclosure so as to
8 deprive Bombardier of the substantial competitive value the documents currently reflect. But
9 MITAC America's limited disclosure now "opens the door" to the gradual and potentially
10 complete degradation of that value. If MITAC America is permitted to continue its piecemeal
11 disclosures of Bombardier's compilation of publicly available information used successfully
12 for certification purposes, Bombardier's entire compilation will eventually become public
13 knowledge, and any competitive value the compilation once had for Bombardier will have
14 been eviscerated before ever having the chance to prove that value at trial. Good cause
15 therefore exists to require the requested redactions—even after MITAC's unauthorized public
16 disclosure of the information at issue.

17 Dkt. No. 76, Declaration of Jerry A. Riedinger in Support of Defendant Mitsubishi
18 Aircraft Corporation America, Inc.'s Opposition to Plaintiff's Motion for Preliminary
19 Injunction:

20 Upon further review, this document contains no information that requires redaction
21 from public viewing.

22 Dkt. No. 77 and 78, Declarations of Stephen Boyd and Dr. Robert John Hansman Jr.,
23 and Accompanying Exhibits:

24 The contents of these documents are for the most part sufficiently generic such that
25 redaction is not required for the vast majority of the document. However, Dr. Hansman and
26 Mr. Boyd do make specific reference to the contents of the documents at issue that the public
27 would not know, would have no need to know, and that have substantial competitive value to

1 Bombardier. (*See* Burns Decl. and Tidd Decl., Dkt Nos. 5 and 7, respectively.) Further, Dr.
 2 Hansman and Mr. Boyd in several instances identify specific publicly available information
 3 that, in the context of their discussions, would reveal that the information is part of the
 4 compilation of public information Bombardier maintains as a trade secret. Dr. Hansman and
 5 Mr. Boyd also state conclusions based on their respective reviews of Bombardier proprietary
 6 information, and in some (but not all) instances, the conclusions disclose specifics of
 7 Bombardier proprietary information that the public has no need to know nor would know
 8 based on publicly available information. The particular language of the declarations requiring
 9 redaction on these bases is identified the McMahon Declaration at Exhibits B-D.

10 Additionally, Bombardier respectfully requests that Exhibits J, K, O, S, and T of the
 11 Boyd Declaration remain under seal in their entirety. These are five of the documents relied
 12 upon by Mr. Boyd to argue that information contained in the Bombardier documents at issue
 13 is publicly available. While the documents Mr. Boyd cites are themselves publicly available,
 14 they are not promulgated by FAA, Transport Canada, or any other aircraft regulatory
 15 certification body, so the public would not necessarily think to turn to these sources for
 16 information pertinent to aircraft certification. Moreover, Mr. Boyd's identification of these
 17 documents, and the disclosure of their contents, in the context of MITAC America's
 18 Opposition establishes that the information contained therein was successfully relied upon by
 19 Bombardier for aircraft certification purposes. This is information that Bombardier alleges to
 20 constitute part of its trade secrets, and Bombardier should have the opportunity to prove as
 21 much before MITAC America is permitted to disclose—even in part—the information
 22 Bombardier has relied upon for aircraft certification.

23 Finally, Bombardier respectfully requests that Exhibit 7 of Dr. Hansman's declaration
 24 remain under seal in its entirety. As noted above, Exhibit 7 expressly identifies 32 topics
 25 contained in Exhibit A to the Tidd Declaration, a document lodged under seal with the Court.
 26 Exhibit 7 also cites where the topic is addressed in that document, and it alleges with
 27 precision where that information can be found in the public. Disclosing this information in a

public filing would deprive Bombardier of the competitive value it derives from the document without having the opportunity to prove the document's worth at trial. *See* Tidd Decl., at ¶¶ 4-7 (explaining the value and proprietary nature of the information contained in Bombardier's CAFM).

Dkt. No. 79, Declaration of Duc Nguyen in Support of Defendant Mitsubishi Aircraft Corporation America, Inc.'s Opposition to Bombardier, Inc.'s Motion for Preliminary Injunction:

Upon further review, this document contains no information that requires redaction from public viewing.

CONCLUSION

For the foregoing reasons, Bombardier respectfully requests that the Court grant in part and deny in part MITAC America's Motion to Seal, as follows:

- That the Motion to Seal is GRANTED with respect to Dkt. Nos. 75, 77, and 78, which are to remain under seal;
- That the Motion to Seal is DENIED with respect to Dkt. Nos. 76 and 79, which are to be filed in the public record;
- That the Clerk shall remove Dkt. No. 71 from the public record; and
- That MITAC America shall file public versions of Dkt. Nos. 75, 77, and 78 in accordance with the requested redactions identified herein and ensuring that no portion of Exhibit 7 to the Hansman Declaration and no portion of Exhibits J, K, O, S, and T to the Boyd Declaration are publicly disclosed.

Dated this 14th day of January, 2019.

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Certificate of service

I hereby certify that on January 14, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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